Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

OPPOSITION OF THE USTELECOM ASSOCIATION

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Summary

The Petition filed by the Coalition of Concerned Utilities (Petition) seeks reconsideration of the Commission's recent order that, among other things, promoted increased broadband deployment by instituting much-need reforms to the Commission's outdated pole attachment rate framework. The Commission correctly established a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between ILECs and IOUs, ILECs will receive comparable pole attachment rates, terms, and conditions as similarly situated telecommunications attachers. Due to the robust record in this proceeding, and the Commission's reasoned legal and policy analysis for instituting these reforms, the Commission should deny the Petition.

As USTelecom previously explained in this proceeding, excluding "newly-renewed" agreements from the scope of the *2018 Pole Attachment Order* would be too narrow an approach, and would not attain the Commission's stated goal in this proceeding of accelerating the deployment of next-generation broadband infrastructure, and increasing competition.

Despite the Petition's assertions to the contrary, the Commission reasonably concluded that ILECs have no leverage to get IOUs to the bargaining table to negotiate a new agreement. Indeed, based on USTelecom's detailed pole attachment survey (*USTelecom Analysis*), the Commission found that, since 2008, ILEC pole ownership has declined, ILEC pole attachment rates have increased, while pole attachment rates for cable and telecommunications attachers have decreased. The Petition presents no evidence to rebut the Commission's findings of a "wide disparity in pole rental rates," and despite having nearly one year to offer evidence contradicting the *USTelecom Analysis*, the IOUs have failed to do so.

The Commission cited extensive record evidence in this proceeding clearly demonstrating this negotiation imbalance, including the *USTelecom Analysis*. The Petition fails to rebut any of this evidence, and merely restates unsupported allegations that were roundly rejected by the Commission based on the overwhelming record evidence. The Petition essentially seeks to retain the status quo on pole attachment rate regulation established in the Commission's 2011 Pole Attachment Order, as if nothing has changed since that time.

The Commission should similarly reject the Petition's proposal to remove the cap for the ILEC rate at the pre-2011 telecom rate. Contrary to assertions in the Petition, the Commission's clarification of the 2011 Pole Attachment Order that the pre-2011 telecommunications carrier rate is the maximum rate that the utility and ILEC may negotiate is fully justified. Because the cap will also apply in negotiations, it will potentially enable ILECs to get attachment rates that are closer to (though still higher than) those paid by their competitors without resorting to the expensive and time-consuming complaint process.

The Petition's claim that the cap is "factually unsupported," ignores the Commission's longstanding finding that the pre-2011 telecom rate reflects the Commission's analysis of the pro-rata cost incurred by a communications attacher pursuant to Section 224(e). Thus, any rate above that amount would exceed the cost associated with those ILEC attachments.

Moreover, the Commission's 2018 Pole Attachment Order adequately addresses the concerns raised in the Petition by improving its existing complaint framework. The Petition fails to acknowledge that if IOUs believe that the ILEC receives net material benefits from a particular joint use agreement – including one that is "newly-renewed" – they are free to rebut the presumption through the Commission's established case-by-case complaint framework.

The Commission should similarly reject the Petition's arguments regarding the purported benefits to ILECs resulting from joint use agreements. While claiming that ILECs continue to benefit from joint use agreements, the Petition fails to document this assertion or otherwise identify with particularity why the Commission should change course. Rather, it merely restates the argument that the ILECs' purported benefits of joint use are so ubiquitous and substantial as to justify retaining the presumption that ILECs are not similarly situated to other telecommunications attachers, which the Commission has already rejected. Moreover, many of the claimed benefits of joint use cited in the Petition represent one-time, non-recurring events that – given the passage of time – have long surpassed any intrinsic value.

The Commission should also reject the Petition's request that "any percentage reduction in the per pole attachment fees ILECs pay to electric utilities should be matched by the same percentage reduction in the per pole amount electric utilities pay ILECs." The Coalition provides no evidence in its Petition to support its contention that such a rule would be appropriate for the variety of joint use agreements that exist. To the extent that an IOU believes that a Commission-imposed just and reasonable rate for an ILEC should warrant rate relief for the IOU, the Commission can address that issue on a case-by-case basis through the existing complaint framework and the guidance in the 2011 Pole Attachment Order.

In a separate petition, the City of New York (New York Petition) claims that section 253(a) does not support the preemption of moratoria adopted in the Declaratory Ruling, arguing, among other things, that section 253(a) bars prohibitions on "service" not deployment, and that the reclassification of broadband internet access service as an information service makes section 253(a) inapplicable. The Commission has already considered and rejected these and related jurisdictional arguments in the Declaratory Ruling, and need not revisit them here.

As an initial matter, the Commission is authorized to define the scope of its authority under section 253(a), and to interpret what constitutes a violation that provision. Further, the Commission has explained that because certain state and local moratoria on telecommunications services and facilities deployment "prohibit or have the effect of prohibiting" the provision of telecommunications services, they are properly barred by section 253(a). The Commission should reject these rehashed and unpersuasive arguments about the scope of its authority to preempt moratoria under section 253(a), and deny the New York Petition.

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OPPOSITION OF
THE USTELECOM ASSOCIATION

USTelecom – the Broadband Association (USTelecom)[1] submits this opposition to the Federal Communications Commission (Commission) in response to the portions of the Petition for Reconsideration (Petition) filed by the Coalition of Concerned Utilities (Coalition) that address issues relating to joint use rates.[2] The Petition seeks reconsideration of the Commission's recent order that, among other things, promoted increased broadband deployment by instituting much-need reforms to the Commission's outdated pole attachment rate framework (*2018 Pole Attachment Order*).[3]

[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

[2] *See*, Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79 (submitted October 15, 2018) (*Petition*). USTelecom takes no position on the other portions of the Coalition's *Petition*.

[3] Third Report and Order and Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79 (released August 3, 2018) (*2018 Pole Attachment Order*).

Despite the robust record in this proceeding, and the Commission's reasoned legal and policy analysis for instituting these reforms, the Petition seeks reconsideration of the: 1) application of the presumptive just and reasonable rate for incumbent local exchange carriers (ILECs) to "newly-renewed" agreements; and 2) establishment of a cap for the ILEC rate at the pre-2011 Telecom Rate. The Petition also seeks proportional adjustments to rates charged by ILECs to investor-owned utilities (IOUs) for attaching to poles. USTelecom also opposes certain arguments in the petition submitted by the City of New York challenging the Commission's authority to preempt moratoria provisions under section 253 (New York Petition).[4] For the following reasons, the Commission should deny the Petition and the New York Petition.

I. The Commission Should Deny the Coalition's Petition.

For the reasons set forth in the *2018 Pole Attachment Order* and below, the Commission correctly established a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between ILECs and IOUs, ILECs will receive comparable pole attachment rates, terms, and conditions as similarly situated telecommunications attachers. Petitions for reconsideration are only appropriate where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters, or the Commission determines that consideration of the facts is required in the public interest.[5] Because it fails to meet any of these standards, the Commission should deny the Petition.

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[4] *See*, Petition for Reconsideration of the City of New York, Regarding Sections III. G. and IV. Of the Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79 (filed Sep. 4, 2018) (*New York Petition*).

[5] 47 C.F.R. § 1.429(b); *see also, Griffin Licensing*, Memorandum Opinion and Order, 29 FCC Rcd 9680, ¶ 4 (2014).

A. The Commission's Presumption is Supported By Strong Evidence that ILECs Lack Bargaining Power.

The Commission should reject the Petition's suggestion to limit the established presumption only to "newly-negotiated" agreements.[6] The Petition ignores both the factual record in this proceeding, and the Commission's reasoned legal and policy analysis in reaching this conclusion. Further, grant of the Petition would undermine the Commission's goals of "energiz[ing] and further accelerat[ing] broadband deployment,"[7] by reversing the Commission's longstanding finding that ILECs should be subject to comparable pole attachment rates. Moreover, the Petition ignores the fact that an IOU can attempt to rebut the presumption.

As USTelecom previously explained in this proceeding, excluding "newly-renewed" agreements from the scope of the *2018 Pole Attachment Order* would be too narrow an approach,[8] and would not attain the Commission's stated goal in this proceeding of "accelerat[ing] the deployment of next-generation infrastructure so that consumers in all regions

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[6] *Petition*, p. 6.

[7] *2018 Pole Attachment Order*, ¶ 126 (citing Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 (submitted November 21, 2017) (*USTelecom Analysis Ex Parte*)).

[8] Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 1 (submitted July 27, 2018) (*USTelecom 2018 Ex Parte*) (USTelecom further explained that, as a practical matter, ILECs cannot threaten removal of electric facilities because doing so would create a public safety hazard, and traditionally, joint use agreements do not allow for ILECs to remove electric facilities from poles. At the same time, unlike other attachers, ILECs have no right of attachment, so if ILECs refuse to pay unreasonable rates under "evergreen" contracts, IOUs can prevent ILECs from any new build opportunities such as new subdivisions and fiber-to-the-cell 5G deployments. Given these uneven negotiating postures, ILECs would have no way to get IOUs to the negotiating table if IOUs refuse to negotiate, as would be the case if the modified telecom rate presumption applies to only new agreements.).

of the Nation can enjoy the benefits of high-speed Internet access as well as additional competition."[9]

Despite the Petition's assertions to the contrary, the Commission reasonably concluded that ILECs have no leverage to get IOUs to the bargaining table to negotiate a new agreement. Indeed, the Commission stated in its *2018 Pole Attachment Order* that it was "convinced by the record evidence" which showed that, "since 2008, incumbent LEC pole ownership has declined and incumbent LEC pole attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased)."[10] Thus, the "wide disparity in pole rental rates," which the Commission recognized as a barrier to broadband deployment in 2011, has in fact widened.[11]

The Petition presents no evidence to rebut the Commission's findings which are fully supported in the record, including USTelecom's detailed member survey demonstrating the continuing decline in ILEC pole ownership (*USTelecom Analysis*).[12] Despite having nearly one year to offer evidence contradicting the *USTelecom Analysis*, the IOUs have failed to do so.

The *USTelecom Analysis* also showed a significant difference in the ratio between the number of IOU poles to which ILECs attach and the number of ILEC poles to which IOUs

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[9] Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, ¶ 5 (released April 21, 2017).

[10] *2018 Pole Attachment Order*, ¶ 126. These findings were detailed in USTelecom's November 2017 survey (*USTelecom Analysis*) which showed that pole attachment rates paid by ILECs to IOUs have not declined despite the Commission's expectations in its *2011 Pole Attachment Order*. *See*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 (submitted November 21, 2017) (*USTelecom Analysis*). *See also*, Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 76 FR 40817, FCC 11-50, (released April 7, 2011) (*2011 Pole Attachment Order*).

[11] *2011 Pole Attachment Order*, ¶ 3.

[12] *2018 Pole Attachment Order*, ¶ 125 (citing *USTelecom Analysis Ex Parte*).

attach, thereby creating an environment whereby "bargaining power is heavily skewed to the IOUs."[13] Contrary to assertions in the Petition that the decrease in ILEC pole ownership has been intentional, this pole ownership disparity is primarily the result of marketplace realities whereby IOUs have intentionally and inexorably increased their pole ownership.

As noted by various commenters in this proceeding, the increase in IOU pole ownership has been driven by a number of factors that are not in the ILECs' control, including greenfield deployment of IOU networks, national disaster recovery efforts, and IOU pole replacement activities.[14] In addition to installing the new utility poles which they immediately claim as their own, they are also unwilling to sell them. In other instances, IOUs will sometimes replace ILEC poles – often times without providing notice to the ILEC – in order to accommodate new power attachments or during storm restoration).[15]

As USTelecom previously noted in this proceeding, excluding newly-renewed agreements from the rules would fully undercut the Commission's broadband deployment goals envisioned in its *2018 Pole Attachment Order*.[16] By providing greater rate parity between ILECs and similarly-situated telecommunications attachers, the Commission reasonably concluded that such a framework would "encourage infrastructure deployment by addressing incumbent LECs' bargaining power disadvantage."[17]

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[13] *USTelecom Analysis*, p. 7.

[14] *See e.g.*, Reply Comments of CenturyLink, WC Docket No. 17-84, pp. 3 – 4 (submitted July 17, 2017) (noting that when new neighborhoods are built, IOUs are the first to move into those areas.

[15] *See e.g.*, Comments of Verizon, WC Docket No. 17-84, p. 11 (submitted June 15, 2017).

[16] *USTelecom 2018 Ex Parte*, p. 2.

[17] *2018 Pole Attachment Order*, ¶ 127.

The Commission cited extensive record evidence in this proceeding clearly demonstrating this negotiation imbalance, including the *USTelecom Analysis*. The Petition fails to rebut any of this evidence, and merely restates unsupported allegations that were roundly rejected by the Commission based on the overwhelming record evidence.

The Petition essentially seeks to retain the status quo on pole attachment rate regulation established in the Commission's 2011 pole attachment order ("*2011 Pole Attachment Order*"),[18] as if nothing has changed since that time. This, despite the Commission's acknowledgement of "changed circumstances" since the *2011 Pole Attachment Order*.[19] These changed circumstances guided the Commission's decision to establish the presumption that ILECs are "similarly situated to other telecommunications attachers" and are therefore entitled to "pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers," including for "new and newly-renewed pole attachment agreements" between IOUs and ILECs.[20]

As previously noted by USTelecom, no matter how wrong the IOU was regarding any (long since passed) purported benefits of an existing joint-use agreement, the IOU would have every incentive to let such agreements – in many cases thirty, forty, fifty years old and greater – languish in "evergreen" status at unreasonable rates, entirely refusing to renegotiate. USTelecom discussed our members' experience with such tactics in the past, which included delays to

[18] *2011 Pole Attachment Order*.

[19] *2018 Pole Attachment Order*, ¶ 126.

[20] *Id*.

deployment efforts, and IOUs imposing unreasonable preconditions to renegotiation.[21] Under such conditions, litigation would be considerably more likely, not less.

Indeed, in its *2011 Pole Attachment Order*, the Commission tried the approach of deferring to ILECs and IOUs as they renegotiate their joint use agreements.[22] Despite these efforts, the Commission reasonably concluded in its *2018 Pole Attachment Order* that IOUs continued to charge pole attachment rates significantly higher than the rates charged to similarly situated telecommunications attachers. The fact that the average rate paid by ILECs has increased over the past seven years, despite the Commission's ruling in its *2011 Pole Attachment Order*, demonstrates that IOUs can and will successfully resist providing comparable rates to ILECs under the status quo.

The Commission should similarly reject the Petition's proposal to remove the cap for the ILEC rate at the pre-2011 telecom rate. Contrary to assertions in the Petition, the Commission's clarification of the *2011 Pole Attachment Order* that the pre-2011 telecommunications carrier rate is the maximum rate that the utility and ILEC may negotiate is fully justified.[23] Based on record evidence, the Commission reasonably concluded that establishment of such an upper bound would provide further certainty within the pole attachment marketplace.[24] Because the

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[21] *See* Ex Parte Notice, from Roy Litland, Verizon, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 3 (submitted July 26, 2018). *See also*, Reply Comments of CenturyLink, WC Docket No. 17-84, pp. 1 – 11 (submitted July 17, 2017) (discussing the negotiation process with IOUs as "often . . . non-existent," due to unreasonable IOU demands such as "demands that attachments be removed unless CenturyLink enters into a new license agreement at higher rates."). *Id.*, p. 4.

[22] *2011 Pole Attachment Order*, ¶ 215 (stating that "Where parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations.").

[23] *2018 Pole Attachment Order*, ¶ 129.

[24] *Id*.

cap will also apply in negotiations, it will potentially enable ILECs to get attachment rates that are closer to (though still higher than) those paid by their competitors without resorting to the expensive and time-consuming complaint process.

The Petition's claim that the cap is "factually unsupported,"[25] ignores the Commission's longstanding finding that the pre-2011 telecom rate reflects the Commission's analysis of the pro-rata cost incurred by a communications attacher pursuant to Section 224(e).[26] Thus, any rate above that amount would exceed the cost associated with those ILEC attachments. Given the highly competitive broadband marketplace, a cap is necessary in order to ensure that ILECs can get attachment rates that are comparable to those paid by their competitive local exchange carrier (CLEC) and cable competitors.

Moreover, the Commission's *2018 Pole Attachment Order* adequately addresses the concerns raised in the Petition by improving its existing complaint framework. The Petition fails to acknowledge that if IOUs believe that the ILEC receives net material benefits from a particular joint use agreement – including one that is "newly-renewed" – they are free to rebut the presumption through the Commission's established case-by-case complaint framework.

Specifically, the Commission concluded that "to the extent ILECs receive net benefits distinct from those given to other telecommunications attachers, a utility may rebut the presumption."[27] Of course, the Commission also emphasized in its *2018 Pole Attachment Order*

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[25] *Petition*, p. 6.

[26] *See*, Order and Further Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act*, 25 FCC Rcd 11864, FCC 10-84, ¶ 113 (released May 20, 2010) (noting that "under the telecom rate formula . . . two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner.").

[27] *2018 Pole Attachment Order*, ¶ 127.

that the utility must rebut the presumption with "*clear and convincing evidence* that the incumbent LEC receives *net benefits* under its pole attachment agreement with the utility *that materially advantage* the incumbent LEC over other telecommunications attachers."[28]

B. The Petition Fails to Rebut the Commission's Reasoned Presumption That ILECs are Comparably Situated to their Competitors.

The Commission should similarly reject the Petition's arguments regarding the purported benefits to ILECs resulting from joint use agreements.[29] While the Petition characterizes these alleged benefits of joint use as uniform and ubiquitous, the record in this proceeding includes ample evidence to the contrary.[30] While claiming that ILECs continue to benefit from joint use agreements, the Petition fails to document this assertion or otherwise identify with particularity why the Commission should change course. Rather, it merely restates the argument that the ILECs' purported benefits of joint use are so ubiquitous and substantial as to justify retaining the presumption that ILECs are not similarly situated to other telecommunications attachers, which the Commission has already rejected.

In essence, the Petition merely seeks to re-litigate the Commission's rejection of the notion that joint use agreements uniformly confer unique benefits on ILECs. As reflected in the *2018 Pole Attachment Order*, the record in this proceeding shows that the electric utilities have not supported their claims that joint use agreements confer unique benefits on ILECs. In

[28] *Id.*, ¶ 123 (emphasis added).

[29] *Petition*, p. 6.

[30] *See e.g.*, Comments of Verizon, WC Docket No. 17-84, pp. 12, n. 30 (submitted July 17, 2017); Reply Comments of AT&T Services, Inc., WC Docket No. 17-84, p. 12 (submitted July 17, 2017); Reply Comments of Verizon, WC Docket No. 17-84, pp. 11 – 12 (submitted July 17, 2017); Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 2 (submitted December 8, 2017).

addition to the Commission reaching this conclusion in its *2018 Pole Attachment Order*,[31] the Enforcement Bureau reached an identical conclusion in its *2017 Dominion Rate Case Order*.[32]

Moreover, many of the claimed benefits of joint use cited in the Petition represent one-time, non-recurring events that – given the passage of time – have long surpassed any intrinsic value. For example, the Petition claims that the absence of advance approvals is an inherent benefit to ILECs, despite the fact that any such benefit has run its course for equipment on the pole for several years. Similarly, assigning the ILEC a specified number of feet on the pole hardly constitutes a benefit "not enjoyed by third party attachers,"[33] since those attachers are also assigned specified attachment space. Moreover, many of the purported benefits of joint use agreements cited by the IOUs are reciprocal, rather than "net," benefits. An ILEC may be able to attach without prior approval to an IOU pole under some joint use agreements, but, in exchange, the ILEC allows the IOU to do the same for ILEC poles covered by that agreement. Similar reciprocity applies to most of the joint use "advantages" claimed by the IOUs.[34]

II. There is No Need for the Commission to Clarify the Rates That ILECs Can Charge IOUs to Attach to ILEC Poles.

The Commission should also reject the Petition's request that "any percentage reduction in the per pole attachment fees ILECs pay to electric utilities should be matched by the same percentage reduction in the per pole amount electric utilities pay ILECs."[35] The Coalition

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[31] *Id.*, ¶ 128.

[32] *See, Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company d/b/a/ Dominion Virginia Power*, Order, 32 FCC Rcd 3750, ¶ 21 (2017) (*Verizon v. Dominion Power*).

[33] *Petition*, p. 4.

[34] *Id.*

[35] *Petition*, p. 7.

provides no evidence in its Petition to support its contention that such a rule would be appropriate for the variety of joint use agreements that exist.[36] To the extent that an IOU believes that a Commission-imposed just and reasonable rate for an ILEC should warrant rate relief for the IOU, the Commission can address that issue on a case-by-case basis through the existing complaint framework and the guidance in the *2011 Pole Attachment Order*.[37] Given the variability in joint use agreements and the lack of evidence on this issue, the Petition has not shown a material error or omission that warrants reconsideration on this issue.

III. The Commission Should Also Reject Arguments That it Lacks Authority Under Section 253 to Preempt Moratoria Provisions.

The City of New York claims that section 253(a) does not support the preemption of moratoria adopted in the Declaratory Ruling, arguing, among other things, that section 253(a) bars prohibitions on "service" not deployment, and that the reclassification of broadband internet access service as an information service makes section 253(a) inapplicable.[38] The Commission

[36] Indeed, previous Commission findings show that ILECs sometimes pay disproportionately higher rates than IOUs. Providing proportionate rate reductions would lock in such disparities. For instance, the Enforcement Bureau's 2017 *Dominion* decision directly addressed the rate imbalance scenario raised in the Petition. *Verizon v. Dominion Power*, ¶ 21. There, the Enforcement Bureau considered an argument from Verizon that the per-pole rate that Dominion charged Verizon was unjust and unreasonable, because it "far exceed[ed] the per-pole rates that Verizon charge[d] Dominion," despite Dominion's use of "significantly more space." Because Dominion acknowledged that the parties enjoyed "'reciprocal'" rights under their joint use agreement, the Enforcement Bureau concluded that Dominion "failed to show that Verizon receive[d] a disproportionate benefit" that would account for the difference in rates between the parties. *Id.*

[37] *See 2011 Pole Attachment Order*, ¶ 218 ("[W]e would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach to its poles."); *id.* at n.662 ("We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space).").

[38] *See New York Petition.*

has already considered and rejected these and related jurisdictional arguments in the Declaratory Ruling, and need not revisit them here.

As an initial matter, the Commission is authorized to define the scope of its authority under section 253(a), and to interpret what constitutes a violation that provision.[39] Further, the Commission has explained that because certain state and local moratoria on telecommunications services and facilities deployment "prohibit or have the effect of prohibiting" the provision of telecommunications services, they are properly barred by section 253(a).[40] Moreover, the Commission expressly disagreed with assertions that the reclassification of broadband Internet access service affects the validity of its moratoria preemption, noting (consistent with Commission precedent) that it has "authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis."[41] Therefore, the Commission should reject these rehashed and unpersuasive arguments about the scope of its authority to preempt moratoria under section 253(a).

[39] *See, 2018 Pole Attachment Order*, ¶ 163.

[40] *See*, *Id.*, ¶ 162.

[41] *Id.*, ¶ 167.

IV. Conclusion

For the foregoing reasons, the Commission should deny the Petition and the New York Petition.

Respectfully submitted,

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